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# SOCIAL PROBLEMS AND THE COURTS

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The judges in the several courts of justice, says Blackstone, "are the depositaries of the laws, the living oracles who must decide in all cases of doubt." Hence, to the practical American, taught that law is law because the courts so decide, it may well seem clear enough, when the law lags in the social movements that are going on all about us, that the fault must lie with the courts. That he does assume this is shown by the vogue of crude schemes for overhauling our judicial organization, the currency of so-called reforms of the courts which disregard all judicial experience and legal history, and the popularity of the legal muckraker whose garbled accounts of decisions might have been written of our courts from the beginning of our government with quite as much truth, but a generation ago would not have been able to find a publisher. In other lands, however, where the courts have no such rôle in the process of government as they have with us, the problem of making the law an effective social instrument, a means of achieving social progress, is quite as real as with us. On the Continent, under the influence of Roman-law ideas, the courts or judges are not thought of as depositaries or as oracles of the law. Whereas we say a rule is law because the courts apply it in the decision of causes, they say upon the Continent that the courts apply the rule in the decision of causes because it is law. And yet the socialization of law is a problem the world over. A whole literature upon this subject has sprung up in Germany and in France. Our situation in America is in no way unique; and if it is more acute, the reason is to be found in our eighteenth-century system of checks and balances, in the legal, political, and philosophical charts called Bills of Rights by which our fathers sought to confine courts and legislatures and sovereign peoples for all time within the straight and narrow course of individualist natural law.

For a time there was need of propagandist agitation. It was necessary that the public, the legal profession, and the courts be made to recognize that our legal system was to be re-examined, many of its fundamental principles recast, and the whole readjusted to proceed along new lines. This task of awakening has been achieved. A generation ago it would have been hard to find anyone to question that upon the whole American law was quite what it should be. Some of the older members of the bar, indeed, still cherish the belief which was then universal. But first the economists and sociologists and students of government, and then the bar itself, have been thinking upon this matter freely and vigorously until criticism has become staple. Nowhere is this change more noticeable than in the reports and proceedings of our Bar Associations. Not long ago the dominant note was one of eulogy, of pride in our system and in its administration, and complacent comparison with what we took to be the legal systems of other peoples. Today each volume of such proceedings is filled with critical comments, upon every side, of the law and of its administration, and the more conservative are content with a tone of apology or with deprecating extravagant criticism. The need for propaganda has passed. Now for a season we need careful diagnosis and thoroughgoing study of the lines upon which change is to proceed. A change in juridical fundamentals must begin at the beginning. The problem of the sociological jurist lies far deeper than individual courts or judges and deeper than lawyers or courts and judges collectively.

Legal history shows that from time to time legal systems have to be remade, and that this new birth of a body of law takes place through the infusion into the legal system of something from without. A purely professional development of law, which is necessary in the long run, has certain disadvantages, and the undue rigidity to which it gives rise must be set off from time to time by receiving into the legal system ideas developed outside of legal thought. Such a process has taken place twice in the history of our own law. In the sixteenth and seventeenth centuries the common law, through purely professional development in the King's Courts, had become so systematic and logical and rigid that it took no account of the moral aspects of causes to which it was to be applied. With

equal impartiality its rules fell upon the just and the unjust. As Dean Ames put it, the attitude of the law was unmoral. The rise of the Court of Chancery and the development of equity brought about an infusion of morals into the legal system—an infusion of the ethical notions of chancellors who were clergymen, not lawyers—and made over the whole law. Again in the eighteenth century the law had become so fixed and systematized by professional development as to be quite out of accord with a commercial age. As the sixteenth-century judge refused to hear of a purely moral question, asking simply, what was the common law, so the eighteenth-century judge at first refused to hear of mercantile custom and commercial usage, and insisted upon the strict rules of the traditional law. But before the century was out, by the absorption of the law merchant, a great body of non-professional ideas, worked out by the experience of merchants, had been infused into the legal system and had created or made over whole departments of the law. Today a like process is going on. The sixteenth-century judge who rendered judgment upon a bond already paid, because no formal release had been executed, and refused to take account of the purely moral aspects of the creditor's conduct, the great judge in the eighteenth century who refused to allow the indorsee of a promissory note to sue upon it because by the common law things in action were not transferable, and would not listen to the settled custom of merchants to transfer such notes nor to the statement of the London tradesmen as to the unhappy effect of such a ruling upon business, have their entire counterpart in the judges of one of the great courts of the United States in the twentieth century to whom the economic and sociological aspects of a question appear palpably irrelevant.

The parallel is so close that it is worth pursuing. Addressing himself to a doctor of divinity, a serjeant at law of the reign of Henry VIII disposed of the purely moral aspect of allowing recovery upon a bond paid but not formally released in these words:

> In what uncertaintie shall the king's subjects stande, whan they shall be put from the lawe of the realme, and be compelled to be ordered by the discretion and conscience of one man! And namelie for as moch as conscience is a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrosse, that they ofende in conscience, and some man

thinketh that if he lake money, and another hath too moche, that he may take part of his with conscience; and so divers men divers conscience; for everie man knoweth not what conscience is so well as you Mr. Doctour.

In 1704 Lord Holt, when the question of negotiation of promissory notes was before him, spoke of "the mighty ill consequences that it was *pretended* would ensue by obstructing this course," and asked "why do not dealers use that way which is legal?" and proceeded to argue upon strict common-law grounds why the indorsement of a note could not be given effect.

In 1911 the Court of Appeals of New York, having a Workmen's Compensation Act before it, said:

> The report of the commission . . . . is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers, and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions.

The sixteenth- and seventeenth-century law was brought to take account of ethics. The eighteenth-century law came to receive the custom of merchants as part of the law of the land. May we not be confident that in the same way the law of the twentieth century will absorb the new economics and the social science of today and be made over thereby?

A developed legal system is made up of two elements, a traditional element and an enacted or imperative element. Although at present the balance in our law is shifting gradually to the side of the enacted element, the traditional element is still by far the more important. In the first instance, we must rely upon it to meet all new problems, for the legislator acts only after they attract attention. But even after the legislator has acted, it is seldom if ever that his foresight extends to all the details of his problem or that he is able to do more than provide a broad, if not a crude, outline. Hence even in the field of the enacted law, the traditional element of the legal system plays a chief part. We must rely upon it to fill the gaps in legislation, to develop the

principles introduced by legislation, and to interpret them. Let us not forget that so-called interpretation is not merely ascertainment of the legislative intent. If it were, it would be the easiest instead of the most difficult of judicial tasks. Where the legislature has had an intent and has sought to express it, there is seldom a question of interpretation. The difficulties arise in the myriad cases with respect to which the lawmaker had no intention because he had never thought of them—indeed, perhaps he could never have thought of them. Here under the guise of interpretation the court, willing or unwilling, must to some extent make the law, and our security that it will be made as law and not as arbitrary rule lies in the judicial and juristic tradition from which the materials of judicial law-making are derived. Accordingly the traditional element of the legal system is and must be used, even in an age of copious legislation, to supplement, round out, and develop the enacted element; and in the end it usually swallows up the latter and incorporates its results in the body of tradition. Moreover, a large field is always unappropriated by enactment, and here the traditional element is supreme. In this part of the law fundamental ideas change slowly. The alterations wrought here and there by legislation, not always consistent with one another, do not produce a general advance. Indeed they may be held back at times in the interests, real or supposed, of uniformity and consistency, through the influence of the traditional element. It is obvious, therefore, that above all else the condition of the law depends upon the condition of this element of the legal system. If the traditional element of the law will not hear of new ethical ideas, or will not hear of the usages of the mercantile community, or will not hear of new economics or of the tenets of the modern social sciences, legislation will long beat its ineffectual wings in vain. Probably all of you know this from experience. At the end of the nineteenth century, through the dominance of eighteenth-century philosophical ideas in professional thinking and of the ideas of the historical school in legal teaching, the leading conceptions of Anglo-American common law had come to be regarded as fundamental conceptions of legal science. Not merely the jurist, but the legislator, the sociologist, the criminalist, the labor leader, and even, as in the case of our

corporation law, the business man, had to reckon with them. A great part of the present dissatisfaction with our courts has its origin in decisions of the end of the last century, when ideas of finality of the common law were general—decisions which would be rendered by few courts, if by any, today.

If, however, the causes of the backwardness of the law with respect to social problems and the unsocial attitude of the law toward questions of great import in the modern community are to be found in the traditional element of the legal system, the surest means of deliverance are to be found there also. The infusion of morals into the law through the development of equity was not an achievement of legislation but the work of courts. The absorption of the usages of merchants into the law was not brought about by statutes but by judicial decisions. When once the current of juristic thought and judicial decision is turned into the new course our Anglo-American method of judicial empiricism has always proved adequate. Given new premises, our common law has the means of developing them to meet the exigencies of justice and of molding the results into a scientific system. Moreover, it has the power of acquiring new premises, as it did in the development of equity and the absorption of the law merchant, and as it is beginning to do once more today. For there are many signs that fundamental changes are taking place in our legal system and that a shifting is in progress from the individualist justice of the nineteenth century, which has passed so significantly by the name of legal justice, to the social justice of today.

Six noteworthy changes in the law, which are in the spirit of recent ethics, recent philosophy, and recent political thought, may be referred to.

First among these we may note limitations on the use of property, attempts to prevent the antisocial exercise of rights. At this point judicial decision has been an agency of progress. This is not time or place for details. I need only refer to the gradual but steady change of front in our case law with respect to the so-called spite fence, and to the establishment in American case law of doctrines with respect to percolating water and to surface water in which a principle of reasonable use has superseded the old and narrow idea that the owner of the surface could do as he pleased.

Second, we may note limitations upon freedom of contract, such as requirement of payment of wages in cash, regulations of hours and conditions of labor, and limitations upon the power of employers to restrain membership in unions. These have been matters of legislation. But our courts have taken the law of insurance practically out of the law of suretyship, and have established that the duties of public-service companies are not contractual, flowing from agreement, but are quasi-contractual, flowing from the calling in which the public servant is engaged. Not merely in labor legislation, but in judicial decision with respect to public callings, the whole course of modern law is belying the famous individualist generalization of the nineteenth century that the growth of law is a progress from status to contract.

Third, we may note limitations on the power of disposing of property. These are chiefly legislative. Examples are the requirement in many states that the wife join in a conveyance of the family home; the statutes in some jurisdictions requiring the wife to join in a mortgage of household goods; the statute of Massachusetts requiring the wife to join in an assignment of the husband's wages.

Fourth, reference may be made to limitations upon the power of the creditor or injured party to secure satisfaction. The Roman law in its classical period had developed something of this sort. In the case of certain debtors as against certain creditors, the Roman law gave the benefit or the privilege of not answering for the entire amount but for so much only as the debtor could pay for the time being. Naturally this doctrine was rejected in the modern civil law as being out of accord with the individualism of the eighteenth and nineteenth centuries. The new German code, however, has a number of provisions restricting the power of the creditor to secure satisfaction, such as, for example, the provision that the statutory liability of an insane wrong-doer shall not go so far as to deprive him of means of support. In the United States, the homestead exemption statutes which prevail in so many states, and the personalty exemptions, which in some states go so far as to exempt five hundred dollars to the head of the family, and usually make liberal exemptions of tools to the artisan, library to the professional man, animals and implements to the farmer, and wages to the head of a family, will serve as illustrations. There is a notable tendency

in recent legislation and in recent discussion to insist, not that the debtor keep faith in all cases, even if it ruin him and his family, but that the creditor must take a risk also—either along with, or even in some cases instead of, the debtor.

Fifth, there is a tendency to revive the primitive idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it which are incident to the undertaking. What Dean Ames, from the standpoint of the historical jurist, reviewing the gradual development of legal doctrines based upon free action of the human will, called "the unmoral standard of acting at one's peril" is coming back into the law in the form of employers' liability and workmen's compensation. There is a strong and growing tendency, where there is no blame on either side, to ask in view of the exigencies of social justice, who can best bear the loss.

Finally, recent legislation, and to some extent, judicial decision, has begun to change the old attitude of the law with respect to dependent members of the household. Courts no longer make the natural rights of parents with respect to children the chief basis of their decisions. The individual interest of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interest of the child and the interest of society. In other words, here also social interests are now chiefly regarded.

It is true many of the examples I have just adduced are taken from legislation. It is true also that some of these legislative innovations upon the settled juridical ideas of the past two centuries have been resisted bitterly by some courts. Yet I am confident that every one of them would stand in the highest court of the land and in a growing majority of our state courts today. Moreover, what is more important, many of the most significant examples are taken from judicial decision. If, therefore, the disease is in the traditional element of our legal system, the cure is going on there under our eyes. It is an infusion of social ideas into the traditional element of our law that we have to bring about; and such an infusion is going on. The right course is not to tinker with our

courts and with our judicial organization in the hope of bringing about particular results in particular kinds of cases, at a sacrifice of all that we have learned or ought to have learned from legal and judicial history. It is rather to provide a new set of premises, a new order of ideas in such form that the courts may use them and develop them into a modern system by judicial experience of actual cases. A body of law which will satisfy the social workers of today cannot be made of the ultra-individualist materials of eighteenth-century jurisprudence and nineteenth-century common law based thereon, no matter how judges are chosen or how often they are dismissed.

A master of legal history tells us that taught law is tough law. Certainly it is true that our legal thinking and legal teaching are to be blamed more than the courts for the want of sympathy with social legislation which has been so much in evidence in the immediate past. One might almost say that instead of recall of judges, recall of law-teachers would be a useful institution. At any rate, what we must insist upon is recall of much of the juristic and judicial thinking of the last century.

For many reasons, which cannot be taken up here, our conception of the end of the legal system came to be thoroughly individualist. Legal justice meant securing of individual interests. It sought by means of law to prevent all interference with individual self-development and self-assertion, so far as this might be done consistently with a like self-development and self-assertion on the part of others. It conceived that the function of the state and of the law was to make it possible for the individual to act freely. Hence it called for a minimum of legal restraint, restricting the sphere of law to such checks as are necessary to secure "a harmonious coexistence of the individual and of the whole." This purely individualist theory of justice culminated in the eighteenth century in the Declaration of the Rights of Man and the Bills of Rights so characteristic of that period. The contests between the courts and the crown in England, which made the common law an effective political weapon in the hands of those who opposed the crown, the thoroughgoing Old Testament individualism of the Puritan in England and America, the rise and establishment of individualist

economics in the period of commercial activity, and the training of the Anglo-American lawyer in the Grotian theories of natural rights set forth in the first book of Blackstone, combined to fasten the notion of justice as a device for securing the maximum of individual self-assertion upon nineteenth-century legal thought. Continental Europe fell away from it first. The English were falling away from it before the work of Bentham's school was complete, and committed themselves to collectivist ideas in their legislation a generation ago. In the United States it persisted to the very end of the nineteenth century. Spencer's formula of justice, "the liberty of each limited *only* by the like liberties of all," represents the ideal which American law has had before it during its whole existence. In politics, in ethics, and in economics this conception has decayed, and has given way to a newer idea of justice. But it continues to rule in jurisprudence. For, although social justice, the last conception to develop, has taken hold of juristic thought in Europe, is making itself felt in legislation, has moved juries in groping for the new standard to render verdicts wholly at variance with the legal theories laid down for their guidance, thus producing a chronic condition of conflict between the courts and juries in certain classes of cases, and has even moved courts here and there in our case law to depart from the ancient landmarks, we must on the whole concede that the sociologists and economists are well warranted in contrasting the idea of justice in American legal philosophy with the idea entertained in all other related sciences.

In contrast with the juristic thinking of the immediate past, which started from the premise that the object of law was to secure individual interests and knew of social interests only as individual interests of the state or sovereign, the juristic thinking of the present must start from the proposition that individual interests are to be secured by law because and to the extent that they are social interests. There is a social interest in securing individual interests so far as securing them conduces to general security, security of institutions, and the general moral and social life of individuals. Hence while individual interests are one thing and social interests another, the law, which is a social institution, really secures individual interests because of a social interest in so doing.

Hence it would seem that no individual may claim to be secured in an interest that conflicts with any social interest unless he can show some countervailing social interest in so securing it—some social interest to outweigh that with which his individual interest conflicts. If we compare with the foregoing proposition the classical statement of Blackstone—

> Besides the public is in nothing so essentially interested as in securing to every individual his private rights—

and if, contrasting these, we bear in mind that the latter represents not only the legal thought of the past but the doctrines to which our fathers sought to hold us for all time by constitutional provisions, we shall see how long a road our legal system has to travel.

In conclusion, I would repeat that study of fundamental problems of jurisprudence, not petty changes of the judicial establishment, is the road to socialization of the law. First of all, there must be a definition of social justice to replace the individualist or so-called legal justice which we have; there must be a definition of social interests and a study of how far these are subserved by securing the several individual interests which the law has worked out so thoroughly in the past; there must be study of the means of securing these social interests otherwise than by the methods which the past had worked out for purely individual interests. Second, there must be study of the actual social effects of legal institutions and legal doctrines. Courts cannot do this, nor can law-teachers or law-writers, except within narrow limits. The futility of a self-sufficing, self-centered science of law has become apparent to jurists. In politics and in sociology the results of centuries of judicial experience deserve to be regarded more than they have been in the past. But far more in jurisprudence the results of present-day social surveys and the knowledge gained by the activities of the army of social workers that have taken upon themselves to do what among other peoples would be left to the state, must be put in the very front of the materials of that science. Its main problem today is to enable and to compel law-making and also the interpretation and application of legal rules to take more account and more intelligent account of the social facts upon which law must proceed and to which it is to be applied.